In the

Supreme Court of the United States

October Term, 1955

No. 46

REX TRAILER COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER

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Statement

Respondent, in its brief, under the heading "The statutory background," points out that property exclusively set aside for veterans by the Administrator as authorized

during the week of June 17, 1947, at Tinker Field, near Oklahoma City, Oklahoma, petitioner "did cause Lester Daniels to make a false statement of a material fact in writing to the War Assets Administration, an agency of the United States Government, for the purpose of obtaining 1 Ross Carrier Company Straddle Truck, model 90-7056, Serial 1940 USA 563821" (R. 2). The complaint contained four additional counts, numbered II through V, which are identical with Count I except as to the name of the person whom petitioner had caused to make the false statement and the description of the vehicle involved (R. 2-3). On the basis of the allegations contained in these five counts, the complaint prayed for judgment in the amount of $2,000 for each of the five frauds perpetrated by petitioner upon the War Assets Administration, as provided in Section 26(b)(1) of the Surplus Property Act (*supra*, p. 2), a total of $10,000 with costs (R. 3).

By its amended answer, petitioner in effect admitted the truth of the allegations in the Government's complaint, but sought to defend on the ground that the Government's action was one for a "statutory penalty" and not "for the collection of any obligation or indebtedness owing to or the recompment or recovery of damage suffered by the [United States]" (R. 6). The answer alleged that petitioner had previously been indicted for the "identical offenses charged in the * * * complaint herein," and that, having pleaded *nolo contendere*,

by the 1946 amendment to the Surplus Property Act (60 Stat. 168) had a "superpriority surpassing even that of the United States" (Resp. Br. 6). However, no such top priority to veterans is involved in this case.[1] The admitted facts are that the Housing Expediter with CPA certificate holders, and Federal agencies, each had a higher priority than certified veterans of World War II to purchase the motor trucks acquired by petitioner under the claimed veterans' priority (R. 7). Where surplus property was not exclusively set aside for veterans by the Administrator, which is the case here, the general first priority to Federal agencies continued to outrank the veterans' preference. See S. Rep. No. 1142, 79th Cong., 2d Sess. pp. 1-2; Resp. Br. 35-36.

The statement in respondent's brief (at p. 7) which implies that the surplus property in this case was offered to veterans "at an attractive price and on favorable credit terms" likewise has no support in the record. Respondent places particular emphasis on section 8302.11 of the Regulations, 32 C.F.R. (1946 Supp.) providing that the "fair value" at which property shall be acquired by priority claimants "shall not be greater than the lowest price which is offered to any trade level at the time of acquisition * * *" (Resp. Br. 7, fn. 6). The lowest price offered could well be more, and not less, than the prevailing market price, and there is nothing in the record to show that the used motor trucks petitioner purchased could have been sold by the War Assets Administration at any higher price than the fixed sale price. In any event, any speculation as to possible loss to the Government on this score, or in any other aspect, is wholly outside the record, since on the admitted facts respondent suffered no financial loss (R. 8).

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[1] In *United States* v. *Weaver*, 207 F. 2d 796 (C. A. 5), the motor vehicles were exclusively set aside for veterans.

Argument

Respondent contends that under this Court's decisions in *Marcus* v. *Hess*, 317 U. S. 537 and *Helvering* v. *Mitchell*, 303 U. S. 391, that once it is determined that the statutory remedy provides restitution for damages to the Government, then the remedy inexorably applies to all cases irrespective of actual damage in a particular case and the double jeopardy clause of the Fifth Amendment has no application (Resp. Br. 11-12, 28). If this be true, which petitioner denies, then Congress may impose such penalties for injuries to the Government as it may see fit under the guise of compensation and collect the penalties in full even though the Government has no loss and in addition punish criminally by fine and imprisonment. To impose liability for violation of statute where there is no loss is not reparation for injury but punishment for wrongdoing within the proscription of the double jeopardy provision.

Both the *Hess* and *Mitchell* cases clearly hold that recovery can only be had if the Government has sustained a loss. In the *Mitchell* case, if there had been no taxes found owing, or a loss to the public fisc, there would have been nothing on which to base the additional 50% fraud penalty. And in the *Hess* case, although as to several of the contracts involved the Government failed to prove an amount of damages, damages in some amount were inferrable from fraudulent collusive bidding, the very purpose of which was to gouge the Government into paying more than competitive bidding would have required. In such case it might be difficult to prove the exact amount of the Government's loss; whereas here, the facts show that there was no loss in any amount and this is admitted by respondent.

Contrary to respondent's contention with respect to the holding in the *Hess* case, Mr. Justice Frankfurter in his concurring opinion understood the Court's opinion in that case to require loss to the Government. As stated by him (317 U. S. at 553):

> "The Fifth Amendment guarantees that no person shall 'be subject for the same offence to be twice put in jeopardy of life or limb.' The respondents invoke this provision as a bar to this suit; and as I understand its holding, the Court rejects this plea of double jeopardy by treating the present action as one merely to make the United States whole for actual loss, and therefore without any punitive elements."

Respondent asserts that damages from frauds committed in connection with the disposal of surplus property including war plants, ships, strategic minerals, airports, aircraft, harbor and port terminals "would be at least as extensive and difficult of exact proof as those resulting from the frauds dealt with in the False Claims Act," and the provision for $2,000 plus double damages "constitutes a reasonable measure, in general, of the foreseeable damage to the Government" (Resp. Br. 31-32). What difficulties may exist in proof of damage resulting from frauds in the sale of property are not shown, but the statutory formula in adding the flat sum of $2,000 is unreasonable and unjust when it is considered that surplus property also included office equipment such as desks, chairs and filing cabinets[2] and items selling for as little as ten cents.[3] The exaction

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[2] Exhibit A following 32 C. F. R. (1946 Supp.), Sec. 8302.14, containing a schedule of property to be set aside for veterans.

[3] Sales listing of the St. Louis Regional Office, War Assets Administration, "Surplus Government Property—Construction, Mining and Farm Machinery—Fixed Price Sale from March 22, 1947 to April 23, 1947," p. 67, offering 178 "Cat Heads, Universal No. 2. Unused, good (0015479-1-2)" at ten cents each.

had paid fines in the aggregate amount of $25,000 (R. 6-7, 8-11). The answer further averred that petitioner's frauds has not caused the Government any damage or loss since it received the full advertised offering price for the trucks and, had the trucks not been sold to petitioner, they would have been sold at the same price to other priority or non-priority purchasers.

Thereafter, both parties moved for summary judgment. The Government's motion was on the ground that there was no genuine issue of fact and further that, since the defenses set out in petitioner's answers were insufficient, the Government was entitled to judgment as a matter of law (R. 3-4). Petitioner's motion was based on the claim that the Government's suit, being for a statutory penalty, was barred by the Fifth Amendment's prohibition against double jeopardy (R. 4-5). The district court overruled petitioner's motion for summary judgment and granted the Government's motion, holding that the double jeopardy provision of the Fifth Amendment was not applicable to this civil action for damages. Accordingly, the district court entered judgment for the Government for $10,000, $2,000 for each of the five frauds practiced by petitioner (R. 12-13). On appeal, the court below affirmed, holding that Section 26(b)(1) was remedial and not penal, and therefore that the action was not barred by the Fifth Amendment's prohibition against double jeopardy (Pet. App. pp. 11-18).

of the arbitrary sum of $2,000 for each fraud without regard to the value of surplus property, and without regard as to whether there was any actual injury or loss, and in the face of the admission by the pleadings that there was no loss, can only be punitive. Cf., *United States* v. *Witherspoon*, 211 F. 2d 858, 861 (C. A. 6); *United States* v. *Weaver*, 207 F. 2d 796, 798 (C. A. 5).

Respondent states that "the statutory provision for the Government's recovery is comparable to a contractual provision for liquidated damages" (Resp. Br. 29), and cites *Priebe & Sons* v. *United States*, 332 U. S. 407, to the effect that such contractual provisions are enforced when fair and reasonable. It is pertinent to note that the Government in that case made an analagous argument to that advanced here in contending that the liquidated damage provision should be enforced "even though no damages were apparent in a particular case" (332 U. S. at 411). In holding that the liquidated damage provision was unenforceable as imposing a penalty, the Court pointed out (at p. 413) that under the circumstances of that case such provision "could not possibly be a reasonable forecast of just compensation for the damage caused by breach of contract" and that "an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust."

The exaction of the stipulated statutory sum of $2,000 in this case where the Government also had no damage is doubly oppressive. To be sure, this $2,000 statutory penalty could be collected in a civil suit in the absence of previous criminal punishment. But when, as here, the Constitutional protection against twice being punished for the same offense is invoked, the penalty cannot be enforced unless there is damage.

By bringing in matters extraneous to the record concerning a supposed shortage of motor vehicles in 1947 and that surplus vehicles were allegedly offered to veterans at less than market prices (cf., the Statement, supra, p. 2), respondent urges that the Government was in fact damaged (Resp. Br. 33-35). If the case had been tried, evidence with respect to such market condition, if it existed, might have been received as bearing on the issue of damages. But there was no trial and the facts are fixed and admitted by the pleadings and the pleadings alone. It is upon those facts the case must be decided, and those facts are that the Government sustained no loss.

The further assertion that petitioner's procurement of the used trucks may have deprived some government agency from obtaining vehicles which it needed, and thus compelled it to purchase on the market at a higher price (Resp. Br. 35-36), is without support in the record. If any Federal agency needed the trucks, it could have exercised its higher priority to the exclusion of petitioner.[4] Here again, the Government had no loss.

The suggestion that the $2,000 is recoverable to reimburse the Government for expense in investigating frauds which caused no financial loss is an attempt by respondent to pull itself up by its own bootstraps.

Respectfully submitted.

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[4] For the order of priority, see the Statement, supra, p. 2, and Petitioner's Brief, pp. 4-5.